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15 October 1996

MEMORANDUM FOR: Assassination Records Review Board

FROM: John F. Pereira
Chief, Historical Review Group

SUBJECT: Foreign Government Information
Australia

(We request that this memorandum be returned to CIA once the Board has completed its deliberations on the issues discussed below.)

1. (S) Issue: This memorandum will address CIA's position on the review and declassification of foreign government information that appears in the JFK collection. This issue has come to CIA's attention because of the recent review by the JFK Board of Australian liaison documents. The Agency believes it is important to address this issue at this time because this is the first instance that this type of foreign liaison document has been reviewed by the Board and it is possible that such information will appear again in CIA's collection. This memo will, therefore, focus on the larger issue of a United States Government (USG) agency's legal obligations in the dissemination and declassification of foreign government information but will also address the specific issue of the six "Australian documents" (documents: 104-10012-10078, 104-10012-10079, 104-10012-10080, 104-10012-10081, 104-10009-10222, 104-10009-10224).

2. (S) Conclusion: CIA does not object to the release of the information in these six documents, but is only concerned about protecting foreign government information. Therefore, the Agency does not object to the release of the four CIA documents in the redacted form proposed by the Board. With regards to the two Australian letters the Agency has no authority to unilaterally agree to their release in any form. Pursuant to its legal obligations, CIA ordinarily seeks the consent of the foreign government prior to declassifying their information. However, for reasons described herein, it is not possible to even seek the consent of the Australians at this time, nor would it be likely that the Australians would give it. Rather than going to the Australians against its better judgment or requesting the

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President to agree to the unilateral declassification of foreign government information, CIA proposes that the release of the Australian documents be either postponed for a short time or that a substitution be made.

3. (U) Legal Authorities: The procedures governing the declassification and dissemination of foreign government information are set out in Executive Order 12958, as well as Director of Central Intelligence Directives (DCIDs). Executive Order 12958 defines foreign government information as including (1) information provided by a foreign government, or any element thereof, with the expectation, expressed or implied, that the information and/or the source of the information, are to be held in confidence; or (2) information produced by the United States pursuant to or as a result of a joint arrangements with a foreign government, or any element thereof, requiring that the information, the arrangements, or both, are to be held in confidence. Id., at §1.1(d)

4. (U) Foreign government information is subject to a classification determination under E.O. 12958, section 1.5(c). When so classified, U.S. government agencies are obligated to protect that information from unauthorized disclosure. The E.O. requires that foreign government information shall either retain its original classification or be assigned a U.S. classification that shall ensure a degree of protection *at least* equivalent to that required by the entity that furnished the information. Id., at 1.7(e). Furthermore, agencies are required to safeguard foreign government information under standards that provide a degree of protection *at least* equivalent to that required by the originating government. Id., at 4.2(g).

5. (U) Pursuant to his authority as head of the intelligence community to protect all classified information from unauthorized disclosure, the Director of Central Intelligence has issued Directives (that is, DCIDs) setting out the procedures for the declassification and dissemination of foreign government information. Intelligence obtained from another government or from a combined effort with another government, may not be released or authorized for release without its consent. DCID 5/6 attachment § C.3. Furthermore, the release of intelligence that would be contrary to agreements between the U.S. and foreign countries is expressly prohibited. Id., at § C.5.

6. (U) Finally, the very fact of intelligence cooperation between the U.S. and specifically named foreign countries and government components is classified SECRET unless a different classification is *mutually* agreed upon. DCID 1/10-1. Such information may be declassified only with the *mutual* consent of the U.S. and the foreign government whose interests are involved. DCID 1/10-1.

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the U.S. and the foreign government whose interests are involved. DCID 1/10-1.

7. (U) National Security Considerations: The importance of such coordination with foreign governments *prior* to the release of their information cannot be overemphasized. Should CIA, or for that matter any (USG) agency fail to coordinate where required, not only would it be a violation of the aforementioned E.O. and directives, but it would chill relationships it has developed with foreign services over the years. If such lack of coordination became known, foreign services would hesitate to share crucial intelligence information with CIA if they believed it would be released, in spite of any agreements or U.S. laws to the contrary, without their consent. Furthermore, the U.S. could not expect foreign services to safeguard U.S. government information that it shares with its liaison partners in order to pursue authorized intelligence and foreign policy objectives.

8. (S) According to its legal obligations described herein, CIA coordinates the dissemination and/or release of foreign government information. Its obligation to do so is similar to its obligation to coordinate declassification efforts with another USG agency should the CIA possess any of that agency's documents. For example, CIA could not declassify and release to the public FBI information located in CIA files without coordinating with that agency. Similarly, CIA has no authority to unilaterally declassify foreign government documents or information in its files.

9. (S) Coordination with Australia: As two of the documents at issue here are letters from the Australian service (104-10009-10224, 104-10012-10080), CIA is legally obligated by E.O. and agreement with the Australians to seek the consent of the Australians prior to their release, even in redacted form. The issue of coordinating with the Australian service is a timely one. In most cases, CIA would not have an objection to going to the foreign government and seeking their consent for declassification. However, several events that have occurred in the last few months depict just how seriously Australia considers any indication that the U.S. is unable to protect from release their classified information. Based on the incidents described below, it is CIA's position that even asking the Australians for consent to release would threaten the current relationship.

- Within the last year, a demarche was made by the Australian government expressing strong concern that U.S. declassification legislation expressly spell out that no information provided to the USG by the Australian service be declassified without its permission. A copy of this demarche is provided for the Board's review. (See attached.) It is worth noting that this demarche is not between intelligence services but

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rather between governments -- it was literally delivered by the Australian Ambassador to the National Security Council and to the U.S. Ambassador to Australia. The manner in which the Australians treated the demarche demonstrates that the protection of classified information is receiving top priority in the Australian government and is not just a concern of their intelligence community.

- On two recent but separate occasions the Australian service passed to CIA information indicating that there would be assassination attempts on two non-U.S. citizens. CIA requested that it pass this information on to the targets, but the Australians refused. They argued that the information was not specific enough and would endanger a source. The Australians stated that if they believed the information was useful, they would pass it themselves. The Australians were concerned that CIA had even asked to pass on this information, and questioned what they perceived as CIA's willingness to share their information with third parties. Finally, they stated that the easiest way to protect their information was simply not to pass it to CIA anymore.

- Just this month, a senior official of the Australian service approached the CIA with accusations that a former Agency employee allegedly may have disclosed their classified information. The Australians believe that this disclosure may be related to the loss of all agent reporting sources in a country of particular interest to them. The DDCI promised the head of the Australian service to launch an investigation into the matter.

- The Australian service recently expressed grave concern to CIA about a book published by an American USG official which alludes to a relationship between the CIA and the Australian service. Even though this book was not an official CIA acknowledgment of a liaison relationship, to the Australians, this incident called into question the CIA's ability to protect that relationship.

10. (S) Under the circumstances, it would be an affront to the Australians to be asked for their consent in light of the above events which have all occurred in the last year. The Australians would not only be extremely upset with CIA, but would certainly deny their consent. Should the Australians deny their consent, CIA would have no authority to agree to the release of the information and would be obligated to do all it could to prevent disclosure. It is crucial not only to CIA's mission but

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also to the conduct of US foreign relations that the USG is seen as abiding by its agreements with foreign services as well as its own laws on the release of information.

11. (S) Finally, the importance of maintaining good relations with the Australians cannot be overemphasized. As a result of our valuable relationship with our Australian liaison counterparts, the USG receives a large volume of finished intelligence. Due to our shrinking resources, much of this information would not be available to U.S. policy makers were it not provided by the Australians. Additionally, we work together with the Australians around the world on joint collection activities that cover the full spectrum of USG intelligence priorities. Finally, there are several critical collection efforts vital to the USG where we do not have the entrée to collect intelligence independently. In these cases, we rely entirely on the continued good will of the Australian services to provide us with the assistance necessary to meet U.S. policymakers' needs.

12. (S) In light of all the above, CIA submits the following two proposals for the Board's consideration. First, the Board could postpone these two documents from release for a short period (we propose 10 months) at which time CIA can reassess its relationship with the Australians. It is possible that the relationship with CIA and Australia could change so that it would be possible to seek their consent for release in full. However, should we seek the consent of the Australians at a future date and the Australians object to the release of the documents, we would ask that the Board seriously consider any negative reaction from the Australians in its deliberations and abide by their desires. A second option would be for CIA to coordinate with the JFK Staff a substitution or some sort of summary of the Australian documents for immediate release. This summary would hide the fact that the letter came from the Australian service, but would reveal what the subject of the letter was. This would avoid the problem of having to go the Australians to seek their consent, which we would have to do even in the case of redactions.

13. (U) Should the Board reject these proposals, CIA is willing to work with the Board to reach another mutually agreeable solution. We strongly believe, however, that any approach which suggests that the U.S. Government may ignore its obligations and commitments to foreign governments would seriously undermine the vigorous and healthy diplomatic as well as intelligence relationships that we currently enjoy.

14. (S) With regard to the remaining four documents (104-10012-10078, 104-10012-10079, 104-10012-10081, 104-10009-10222, these are CIA documents and with the redactions proposed by the

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government. As such, CIA consents to the release of these documents with the redactions proposed by the Board.

15. (S) Proposal for Future Coordination: With regards to any other foreign government information that may exist in the files, CIA proposes that it approach its liaison services to request their consent in the release of their information when it would be appropriate to do so. Although recent events with Australia make it impossible for CIA to approach them at this time, this may not be so with other services. In cases were CIA believes, because of the nature of the relationship, that it would not be possible to request the consent of the service, CIA proposes that the documents either be postponed from release or that CIA and Board's staff coordinate a summary.

John F. Pereira

Attachment

Attached is a copy of the Australian Demarche on U.S. legislation on declassification. This was given to the U.S. Ambassador to Australia, Ambassador Perkins by Philip Flood, then Director of the Office of National Assessments (ONA) in September 1995. This demarche was also given to Sandy Berger at the National Security Council by Australian Ambassador to the United States Don Russell on 4 August 1995.

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AUSTRALIAN COMMENTS ON
EXECUTIVE ORDER 12958 —
CLASSIFIED NATIONAL SECURITY INFORMATION

- The Australian government wishes to register its concern over the 17 April Executive Order on Classified National Security Information and the apparent omission of any explicit provision to protect foreign-sourced information or documentation from automatic declassification once it is over 25 years old.

- The Australian government understands and supports the democratic principles and commitment to open government which underpin the Executive Order. We too are improving access to government information, but are maintaining provisions to protect foreign-sourced information — including U.S. information.

- We do not agree that these principles can be applied by one foreign government to the information or documentation of another government without prior consultation and clearance. Australian-sourced information was and continues to be passed to the U.S. government on the understanding that it will be protected. We adopt precisely the same approach to information that the U.S. shares with us.

- Omission of such consultation would, in the eyes of the Australian government, not be in keeping with the 1962 U.S.-Australia General Security of Information agreement or the many other bilateral and multilateral intelligence co- operation and information sharing agreements.

- The failure to protect sensitive Australian-sourced information about, for example, our intelligence operations, could have ramifications for our relations with regional countries and compromise intelligence sources and methods (upon which the U.S. depends in part).

- Australian concerns could be addressed if provision for clearance with originators of foreign-sourced material was embodied in the Information Security Oversight Office implementation directive to U.S. agencies.

  — such an approach should not impede or delay the declassification process — Australia is not seeking this. For example, categories of sensitivity for Australia could be identified. A reasonable time limit could be put on Australian response time after which the U.S. could be free to declassify (we have a similar arrangement with the U.K.).